84-1671

Office - Supreme Court, U.S.
FILED
APR 4 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

NO.

John W. Zeiler, et al, *Petitioners*,

v.

Ohio High School Athletic Association, et al, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DAVID L. KOHLER
7928 Secor Road
Lambertville, MI 48144
(313) 856-3454
Counsel for Petitioners

29pp

QUESTIONS PRESENTED

1. Whether the respondents' rule which prohibits petitioners from participating in the total educational program of their schools solely on the basis of residency, violates petitioners' rights under the Privileges and Immunities Clause of the United States Constitution.

2. Whether the respondents residency rule acts to deny the petitioners' First Amendment free exercise of religion rights.

PARTIES INVOLVED IN THE COURT OF APPEALS

The Plaintiffs/appellants below were: John W. Zeiler, et al[1]. Defendants/appellees below were: Ohio High School Athletic Association, Richard L. Armstrong, Commissioner - O.H.S.A.A., Rev. Martin Donnelly, Principal - Notre Dame Academy, Rev. Ronald Olszewski, Principal - St. Francis DeSales High School, Rev. Thomas McClain, Principal - St. John High School, Sister Jean Zoeller, Principal - St. Ursula Academy.

1. Remaining Plaintiffs/appellants in the court below are listed by footnote as permitted by Rule 21.1(b).

TABLE OF CONTENTS

Page

Questions Presented i

Parties Involved ii

Table of Contents iii

Petition 1

Questions presented 2

Opinion below 2

Jurisdiction 2

Constitutional provisions 3

Statement of the case 3

Reasons for granting the writ 4

Conclusion 8

Appendix A 9

Appendix B 22

CITATIONS

Cases:

Baldwin v. Montana Fish and Game Commission,
436 U.S. 371 4

Blake v. McClund,
172 U.S. 239 6

Board of Ed. of Cent. Sch. Dist. No. 1 v. Allen,
392 U.S. 249 8

Brown v. Board of Education,
347 U.S. 483 5

Doe v. Bolton,
410 U.S. 179 6

Hamilton v. Tennessee Secondary School Athletic Association,
552 F.2d 681 (6th Cir.) 4

Massachusetts v. Murgia,
427 U.S. 307 (per curiam) 5

Pierce v. Society of Sisters,
268 U.S. 510 6

Toomer v. Witsell,
334 U.S. 385 6

United Building and Construction Trades Council of Camden v. Mayor of Camden,
U.S. , 79 L. Ed. 2d 249 . . . . . 4, 5

Ward v. Maryland,
12 Wall. 418 6

Wisconsin v. Yoder,
406 U.S. 205 . . . . . 6, 7

Zobel v. Williams,
457 U.S. 35 5

In the Supreme Court of the United States

OCTOBER TERM, 1984

NO.

John W. Zeiler, et al, Petitioners,

v.

Ohio High School Athletic Association, et al, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, John W. Zeiler, et al,[1] respectfully pray that a Writ of Certiorari issue to review the Judgment and opinion of the District Court for the Northern District of Ohio which was affirmed by the United States Court of Appeals for the Sixth Circuit in an order which was entered in this proceeding on January 11, 1985.

---

[1] Judith T. Zeiler, William J. Zeiler, and Terry M. Zeiler, by and through their next friend John W. Zeiler; James A. Gensbechler, Linda J. Gensbechler, James A. Gensbechler, Jr., by and through his next friend James A. Gensbechler; Kenneth Tomaszewski, Kathleen Tomaszewski, Kara Tomaszewski, and Kenneth Tomaszewski, by and through their next friend Kenneth Tomaszewski; James Amble, Joyce Amble, Jainie Amble, by and through her next friend James Amble; James Stark, Pamela Stark, James Stark, Jr., by and through his next friend James Stark; James D. Stykemain, Bernice C. Stykemain, Aaron Stykemain, by and through his next friend James D. Stykemain; Harry J. Carmean, Katherine A. Carmean, Daniel Carmean, by and through his next friend Harry J. Carmean; Richard F. Gorney, Mary Ann Gorney, Fredrick Gorney, Steven Gorney and Ann Marie Gorney, by and through their next friend Richard F. Gorney; Andrew J. Carroll, Karen L. Carroll, Jennifer Carroll, by and through her next friend

QUESTIONS PRESENTED

1. Whether the respondents' rule which prohibits petitioners from participating in the total educational program of their schools solely on the basis of residency, violates petitioners' rights under the Privileges and Immunities Clause of the United States Constitution.

2. Whether the respondents residency rule acts to deny the petitioners' First Amendment free exercise of religion rights.

OPINION BELOW

The opinion of the district court, not reported, appears as appendix A hereto. No opinion was rendered by the United States Court of Appeals for the Sixth Circuit. The order of the Court of Appeals appears as appendix B hereto.

JURISDICTION

The judgment of the court of appeals for the Sixth Circuit was entered on January 11, 1985. This petition for Certiorari was filed within 90 days of that date. This courts jurisdiction is invoked under 28 USC Section 1254 (1).

Karen L. Carroll; Thomas A. Zoldowski, Susan Zoldowski, by and through his next friend Thomas A. Zoldowski; Frank M. Pisanti, Joan Pisanti; Robert H. Drager, Barbara J. Drager, Stephen Drager, by and through his next friend Robert H. Drager; John F. Thomas, Karen F. Thomas, Jonathon S. Thomas, by and through his next friend John F. Thomas; Gary V. Weber, Carol S. Weber, Victoria Weber, by and through her next friend Gary V. Weber; Francis W. Cahill, Marcia E. Cahill, Christine Cahill, by and through her next friend Francis W. Cahill; Michael J. Burtscher, Marie J. Burtscher, Todd Burtscher, by and through his next friend Michael J. Burtscher; Gary W. Cooper, Sharon Cooper, Mark Wenrick, by and through his next friend Sharon Cooper; Kenneth S. Grycza, Theresa M. Grycza, Robert J. Grycza, by and through his next friend Kenneth S. Grycza; David J. Pienta, Dorothy V. Pienta, Dina Pienta, by and through her next friend David J. Pienta; Dana Pienta, by and through her next friend David J. Pienta, Dan Pienta, by and through his next friend David J. Pienta; Alan Pignin, Suzanne Pighin, Rachele Pighin, by and through her next friend Suzanne Pighin.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article IV, Section 2; The Citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states.

Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .

STATEMENT OF THE CASE

This case was brought under 42 USC, Section 1983. The petitioners consist of a group of high school students and their parents who live in an area in the extreme southern part of Michigan which is a suburb of and contiguous with Toledo, Ohio. The students attend private high schools in Toledo, Ohio and brought suit to challenge the constitutionality of an Ohio High School Athletic Association (hereinafter referred to as OHSAA) rule which prohibits non-residents from participating in inter-scholastic athletics. The rule in question, known as By-law 4-6-10 was adopted by the OHSAA in 1979 and reads in part as follows; "A student whose parents live in another state will be ineligible for athletics in an Ohio members school." The rule is strictly enforced, with residency in the State of Ohio being the only factor involved. All attempts to obtain waivers of this rule through the appeal process of the OHSAA have been denied.

The constitution of the OHSAA states that the purpose of their organization is to regulate, supervise, and administer interscholastic athletic competition among its member schools to the end that the interscholastic program is an integral factor in the total eductional program of the schools. One of the reasons the petitioners send their children to Catholic schools is their desire to have their children participate in a total educational program within the context of a Catholic school system because of their religious beliefs. The Catholic schools to which the plaintiffs send their children in the state of Ohio are much closer than any similar schools located in their home state of Michigan. An example is the John Zeiler family which sends their children to Toledo Central Catholic High School. This school is located 6.3 miles from their residence. It is a

coeducational Catholic high school. The closest similar school in the state of Michigan is located 42 miles from their home, in the city of Ann Arbor. It would take the Zeilers at least 6 hours per day of driving to transport their children to and from that school.

The petitioners obtained a temporary restraining order which prohibited the respondents from enforcing the rule pending a hearing. Pursuant to stipulation of the parties, the hearing on a temporary injunction was consolidated with the hearing on the merits, which was held October 14, 1983. On February 3, 1984 the district court issued its findings of facts and conclusions of law in which it concluded that none of the petitioners constitutional rights had been violated. The petitioners appealed and the Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT WHICH SHOULD BE SETTLED BY THIS COURT.

In reaching its decision, the Court below concluded that a students right to participate in interscholastic athletics as an integral factor in the total educational program of the schools is not protected by the Privileges and Immunities Clause. That Court characterized the right which petitioners seek to protect as the right to participate in interscholastic athletics. In doing so it incorrectly relied on cases which were decided on Fourteenth Amendment grounds, see *Hamilton v. Tenn. Secondary School Athletic Ass'n*, 552 F. 2d 681 (6th Cir. 1976), and applied them to a Privileges and Immunities argument.

In *United Building and Construction Trades, Council of Camden v. Mayor of Camden*, U.S. ,79 L. Ed. 2d 249 (1984). This Court used the *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978) test in determining whether a right is protected by the Clause. It is a two step inquiry whereby an initial determination must be made by the court that the rule burdens one of those privileges and immunities protected by the Clause. In making this determination, the court must find that the discrimination against out of state residents be a matter of fundamental concern. This concept has

been referred to as an essential activity or the exercise of a basic right in *Zobel v. Williams* 457 U.S. 35 (1982) where Justice O'Connor in her concurring opinion uses the term "essential activity" to describe this concept in the context of Privileges and Immunities Clause protection.

This court has held that education is one of the most fundamental activities in our society today.

> "Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education in our democratic society. It is required in the performance of our most basic public responsibilities, even service in the Armed Forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. *Brown v. Board of Education*, 347 U.S., 483, 493, (1954)."

It has not decided to what extent the right to education is protected under the Privileges and Immunities Clause.

Similarly, this Court has held that there is no fundamental right to government employment for the purposes of the Equal Protection Clause protection, *Massachusetts v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam). However, it did protect that right in the *United Building and Construction Trades, supra* under the Privileges and Immunities Clause although it could not have been upheld under the Equal Protection Clause of the Fourteenth Amendment or the Commerce Clause of the Constitution.

The right to participate in the total educational program of the schools through interscholastic athletics bears the same relationship to the right to an education as public employment does to the right to pursue ones calling. Although neither the right to participate in interscholastic athletics as an integral part of a total education nor the right to public employment as part of

ones right to pursue a calling are protected as "fundamental rights" under the Fourteenth Amendment, they are both integral aspects of a larger and more fundamental activity. As such they deserve protection under the Privileges and Immunities Clause.

Another example of a right which is protected by the privileges and immunities clause, although it has not been declared to be a fundamental right, under the Fourteenth Amendment is the right to general medical care. *Doe v. Bolton*, 410 U.S., 179, 200, (1973) protected the right of a non-resident to receive medical services under the Privileges and Immunities Clause;

> "Just as the Privileges and Immunities Clause, Const. Art. IV, Sec. 2, Protects persons who enter other States to ply their trade, *Ward v. Maryland*, 12 Wall. 418, 430 (1871); *Blake v. McClund*, 172 U.S. 239, 248-256 (1898), so must it protect persons who enter Georgia Seeking the *medical services* that are available there. See *Toomer v. Witsell*, 334 U.S. 385, 396-397 (1948). A contrary holding would mean that a State could limit to its own residents *the general medical care* available within its borders." 410 U.S. 200

The need for the Court to decide this issue justifies the grant of certiorari to review the judgment below.

2. THE COURT BELOW HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

This Court has held that parents have a right to provide a private education equivalent to that offered by the state under the Free Exercise Clause of the First Amendment, *Pierce v. Society of Sisters*, 268 U.S., 510 (1925). In *Wisconsin v. Yoder*, 406 U.S., 205, (1972), the Court upheld the rights of parents set forth in *Pierce* including the right of parents to educate their children in a matter which is consistent with their personal religious beliefs. Petitioner Judith Zeiler, representing those petitioners who send their children to private schools for religious reasons testified that she sends her children to Toledo

Central Catholic High School so that they can receive an education within the context of their traditional Catholic Educational System and further testified that she believes participation in the schools athletic programs is an integral part of the total educational experience which she desires for her children within that context. Petitioners argue that although the OHSAA ban on non-resident participation may be neutral on its face, it operates in such a manner as to deny the parents their free exercise of religion rights as guaranteed by the First Amendment. The rule in question has taken away any meaningful choice which petitioners could make concerning giving their children a total education within the Catholic Educational System, giving them the following choices;

A. To send them to the local public school located in the state of Michigan where the children would not receive a catholic education.

B. Send them to a catholic school in the state of Michigan where the extra time and expense involved in transporting the children over 40 miles each way to school would effectively prohibit them from participating in the total educational program.

C. Send their children to a catholic school in the state of Ohio where they could receive a catholic education but be deprived from participating in the total educational program of the school.

This situation arises because the enforcement of the OHSAA ban on non-resident participation creates a de facto denial of the petitioners First Amendment free exercise of religion right to educate their children in a manner that is consistent with their religious beliefs.

Respondents may argue that the rule is neutral on its face and therefore is permissible, but *Yoder,* as well as other cases speak to this argument.

> "A regulation, neutral on its face may, in its application, nonetheless, offend the Constitutional requirement for Governmental neutrality if it unduly burdens the free exercise of Religion." *Yoder, supra,* at 220

Board of Ed. of Cent. Sch Dist No. 1 v. Allen, 392 U.S. 249 (1968) sets forth the following test to determine whether or not law operates against people to deny them their free exercise rights under the First Amendment

> "However, 'it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion'. *Abbington Twp. v. Schempp* [cite omitted] ***."

Operation of this rule has unconstitutionally interfered with the interest of the parents in directing the rearing of their offspring including their education in a church operated school. The decision below has left the petitioners with no meaningful way to provide their children with a total educational experience within the Catholic school system, as guaranteed by the First Amendment and the above cited decisions of this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Northern District of Ohio as affirmed by the Sixth Circuit.

DAVID L. KOHLER
7928 Secor Road
Lambertville, MI 48144
Counsel for Petitioners

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

John W. Zeiler, et al.,

Plaintiffs

vs.

Case No. C 83-765

Ohio High School Athletic Association, et al.,

Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

POTTER, J.:

In this action, brought under 42 U.S.C. §1983, the plaintiffs are Bedford Township, Michigan residents who are students at Catholic high schools in the Toledo area, and their parents. Defendants are the Ohio High School Athletic Association (O.H.S.A.A.), the Commissioner of O.H.S.A.A., and the principals of five Toledo area Catholic high schools. O.H.S.A.A. is a voluntary association whose members include most Ohio public and private high schools and junior high schools. For a history of O.H.S.A.A., *see State, ex rel. Ohio High School Athletic Ass'n v. Judges,* 173 Ohio St. 239, 181 N.E. 261 (1962). The plaintiffs challenge the constitutionality of an O.H.S.A.A. rule, Bylaw 4-6-10, which states in part, "A student whose parents live in another state will be ineligible for athletics in an Ohio member school." Before adopting this rule, the Board of Control, which administers O.H.S.A.A., had hearings and obtained input from school administrators, coaches, athletic directors, and other persons. The rule was adopted by O.H.S.A.A. in February, 1979 when 65.1% of the administrative heads of member schools voted in its favor. The effect of

Bylaw 4-6-10 is to prohibit plaintiff students, as well as other students in Ohio high schools who live out of state, from participating in interscholastic athletics. One purpose of the rule was to make it impossible for schools near state borders to recruit out of state athletes and to thereby receive an unfair competitive advantage in Ohio state athletic tournaments. O.H.S.A.A. sponsors state championships in twelve boys sports and nine girls sports.

Plaintiffs seek injunctive relief and a declaratory judgment on the grounds that the O.H.S.A.A. rule violates: their First Amendment right to free exercise of their Catholic religion; their rights under the Fourteenth Amendment to Due Process and Equal Protection of the laws; and their rights under the Privileges and Immunities Clause, Article IV, Section 2.

On August 26, 1983, a temporary restraining order was granted which restrained O.H.S.A.A. and the individual defendants from enforcing Bylaw 4-6-10 or any similar rule to prohibit nonresidents of Ohio from participating in interscholastic athletic activities. By stipulation of the parties, this Court ordered the trial of the action on the merits to be advanced and consolidated with the application for a preliminary injunction. The plaintiffs filed a pretrial brief. Defendants O.H.S.A.A. and the O.H.S.A.A. Commissioner filed a pretrial brief and proposed findings of fact and conclusions of law. The cause was tried to the Court on October 14, 1983. The Court at that time extended the temporary restraining order until such time as it ruled on the merits.

The plaintiffs filed a post-trial brief. Defendants O.H.S.A.A. and the O.H.S.A.A. Commissioner filed a post-trial brief and revised findings of fact and conclusions of law. The parties, at the request of the Court, prior to the introduction of evidence, filed a stipulation of facts. The Court has reviewed these stipulations and has made additional findings of fact pursuant to Fed.R.Civ.P. 52. The Court has considered the materials filed by the parties and has made its own independent determination.

The proper role of a federal court in this dispute is not to determine the wisdom of Bylaw 4-6-10. Rather, this Court must address its attention to the question of whether the rule as adopted by 65% of O.H.S.A.A. members constitutes an infringement on any constitutional rights of the plaintiffs.

The decision of this Court will affect not only plaintiffs in this suit, who, though Michigan residents, live in the Toledo metropolitan area. The ruling will have statewide impact. Neither the Court's recognition of the practical difficulties which the rule may impose on plaintiff students and their parents nor the Court's views concerning the rule's wisdom or lack of wisdom can divert the Court from the proper focus of its inquiry, that is whether the effect of Bylaw 4-6-10 is to deny plaintiffs any of their federal constitutional rights.

For the reasons stated below, the Court finds that Bylaw 4-6-10 does not result in any constitutional infringement upon the rights of the plaintiffs. Therefore, the relief which the plaintiffs seek is beyond the power of a federal court to grant. The Constitution "does not provide a refuge from ill advised laws," if this be such. *See Valencia v. Blue Hen Conference*, 476 F. Supp. 809 (1979). O.H.S.A.A. and the administrators of member schools, having put the rule in place, have the power to reverse or modify it.

FINDINGS OF FACT

1. Plaintiffs William J. Zeiler, Terri M. Zeiler, James A. Gensbechler, Jr., Kara Tomaszewski, Jainie Amble, James Stark, Jr., Aaron Stykemain, Todd Zoldowski, Tracy Ann Sudek, Steven Pisanti, Daniel Carmean, Stephen Drager, Jonathon S. Thomas, Victoria Weber, Christine Cahill, Todd Burtscher, Fredrick Gorney, Steven Gorney, Ann Marie Gorney, Mark Wenrick, Jennifer Carroll, Robert J. Grycza, Dina Pienta, Dana Pienta, Leslie Whitenburg, and Rachele Pighin are students, hereafter referred to as student plaintiffs, who are residents of Bedford Township, Monroe County, Michigan, and the vicinity and attend Catholic parochial high schools in Toledo, Ohio. Bedford Township is in the extreme southern portion of Monroe County and its southern boundary is contiguous with the northern boundary of Toledo, Ohio.

2. Plaintiffs John W. Zeiler, Judith T. Zeiler, James A. Gensbechler, Linda J. Gensbechler, Kenneth Tomaszewski, Kathleen Tomaszewski, James Amble, Joyce Amble, James Stark, Pamela Stark, James D. Stykemain, Bernice C. Stykemain, Thomas A. Zoldowski, Susan Zoldowski, Richard F. Sudek, Della R. Sudek, Frank M. Pisanti, Joan Pisanti, Harry J. Carmean, Katherin A. Carmean, Robert H. Drager, Barbara J.

Drager, John F. Thomas, Karen F. Thomas, Gary V. Weber, Carol S. Weber, Francis W. Cahill, Marcia E. Cahill, Michael J. Burtscher, Marie J. Burtscher, Richard F. Gorney, Mary Ann Gorney, Gary W. Cooper, Sharon Cooper, Andrew J. Carroll, Karen L. Carroll, Kenneth S. Grycza, Theresa M. Grycza, David J. Pienta, Dorothy V. Pienta, Ann Duffey, Alan Pighin, and Suzanne Pighin are the parents of the student plaintiffs. They are residents of Bedford Township, Monroe County, Michigan, and the vicinity.

3. Bedford Township contains two towns, Lambertville and Temperance.

4. The defendant, Ohio High School Athletic Association, is a voluntary association whose members consist of Ohio public and private schools. Its stated purpose is to regulate, supervise, and administer interscholastic athletic competition among its member schools. It promulgates rules which govern for its members all aspects of interscholastic athletic competition in the State of Ohio, including eligibility, scheduling, tournaments and recruiting rules. All appeals from its decisions or policies must be made to a board made up of O.H.S.A.A. representatives, most of whom are administrators employed by various school districts in the State of Ohio.

5. Defendant Richard L. Armstrong is the Commissioner of O.H.S.A.A. He is the chief executive officer of this association. His duties include enforcing the Bylaws and Regulations and promoting the purpose of the association. He also decides questions and interpretations of the Constitution, Bylaws and Regulations and imposes and enforces penalties, subject to Board of Control review.

6. Defendant Reverend Martin Donnelly is the principal of Central Catholic High School in Toledo, an O.H.S.A.A. member. He is responsible for enforcing the rules and regulations of O.H.S.A.A. at his school.

7. Defendant Reverend Thomas McClain is the principal of St. John's High School, an O.H.S.A.A. member. He is responsible for enforcing the rules and regulations of O.H.S.A.A. at his school.

8. Defendant Reverend Ronald Olszewski is the principal of St. Francis DeSales High School in Toledo, Ohio, an O.H.S.A.A.

member. He is responsible for enforcing the rules and regulations of O.H.S.A.A. at his school.

9. Defendant Sister Jean Zoeller is the principal of St. Ursula Academy in Toledo, Ohio, an O.H.S.A.A. member. She is responsible for enforcing the rules and regulations of O.H.S.A.A. at her school.

10. Defendant Sister Mary Carol Gregory is the principal of Notre Dame High School in Toledo, Ohio, an O.H.S.A.A. member. She is responsible for enforcing the rules and regulations of O.H.S.A.A. at her school.

11. Article 2 of the Constitution of O.H.S.A.A. states in part that its purpose is "to regulate, supervise, and administer interscholastic athletic competition among its member schools to the end that the interscholastic program be an integral factor in the total educational program of the schools."

12. On or about the 22nd day of February, 1979, defendant O.H.S.A.A., by a 65.1% vote, adopted a rule which is now incorporated in the Bylaws as Bylaw 4-6-10 and reads in part, "A student whose parents live in another state will be ineligible for athletics in an Ohio member school."

13. Prior to the promulgation of this rule, students whose parents resided in states other than Ohio were able to participate in interscholastic athletics of O.H.S.A.A. members subject to eligibility of a one-year waiting period.

14. Plaintiffs John W. Zeiler, Judith T. Zeiler, James A. Gensbechler, Linda J. Gensbechler, Kenneth Tomaszewski, Kathleen Tomaszewski, James Amble, Joyce Amble, James Stark, Pamela Stark, James D. Stykemain, Bernice C. Stykemain, Harry J. Carmean, Katherine A. Carmean, Richard F. Gorney, Mary Ann Gorney, Andrew J. Carroll, and Karen L. Carroll are the parents of student plaintiffs William J. Zeiler, Terri M. Zeiler, James A. Gensbechler, Jr., Kara Tomaszewski, Jainie Amble, James Stark, Jr., Aaron Stykemain, Daniel Carmean, Fredrick Gorney, Steven Gorney, Ann Marie Gorney, and Jennifer Carroll, and are practicing members of the Roman Catholic faith, and said plaintiff parents, because of their personal convictions and religious beliefs, desire to send their children to a Catholic coeducational high school and have them participate in the total educational program of the school.

15. Plaintiffs Thomas A. Zoldowski, Susan Zoldowski,

Richard F. Sudek, Della R. Sudek, Frank M. Pisanti, Joan Pisanti, Robert H. Drager, Barbara J. Drager, John F. Thomas, Karen F. Thomas, Gary V. Weber, Carol S. Weber, Francis W. Cahill, Marcia E. Cahill, Michael J. Burtscher, Marie J. Burtscher, Gary W. Cooper, Sharon Cooper, Kenneth S. Grycza, Theresa M. Grycza, David J. Pienta, Dorothy V. Pienta, Ann Duffey, Alan Pighin, and Suzanne Pighin are the parents of student plaintiffs Todd Zoldowski, Tracy Ann Sudek, Steven Pisanti, Stephen Drager, Jonathon S. Thomas, Victoria Weber, Christine Cahill, Todd Burtscher, Mark Wenrick, Robert J. Grycza, Dina Pienta, Dan Pienta, Leslie Whitenburg, and Rachele Pighin, and are practicing members of the Roman Catholic faith, and said plaintiff parents, because of their personal convictions and religious beliefs, desire to send their children to a Catholic noncoeducational high school and have them participate in the total educational program of the school.

16. Some plaintiffs have sought waivers and lodged protests against Rule 4-6-10. Pursuant to O.H.S.A.A. rules, they were required to make their request for waivers of protest of regulations to Commissioner Armstrong or some other official of O.H.S.A.A. Commissioner Armstrong denied their request.

17. When such waivers or protests are denied, including waivers sought by herein plaintiffs for permission to participate in interscholastic athletics, the parties must appeal to the Board of Control, see Bylaw 5-7-1. The Board of Control is a body elected from among the O.H.S.A.A. members, see Bylaw 5-3-1.

18. The Board of Control is invested with the final authority in hearings involving eligibility and hears appeals of rulings made by the Commissioner, see Bylaw 5-7-1.

19. The Bylaws of O.H.S.A.A. do not provide for any appeal procedure outside the control of O.H.S.A.A.

20. A purpose of Bylaw 4-6-10 is to prevent the displacement of Ohio resident students participating in interscholastic athletics by non-resident students.

21. A purpose of Bylaw 4-6-10 is to prevent the recruitment by O.H.S.A.A. members of non-resident athletes.

22. Bylaw 4-6-10 has had the effect of reducing tensions between public and private schools who are O.H.S.A.A. members. There has been an improved spirit of cooperation between

public and non-public schools since Bylaw 4-6-10 became effective in July, 1979.

CONCLUSIONS OF LAW

This Court has jurisdiction over the subject matter of this action under 28 U.S.C. S1331 and 28 U.S.C. S1343.

This action arises under 42 U.S.C. §1983 which states in relevant part:

> Every person who under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The First Amendment of the Constitution provides in relevant part: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof."

In relevant part, the Fourteenth Amendment of the Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Privileges and Immunities Clause, Article IV, Section 2, states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

To succeed on a claim under 42 U.S.C. §1983, plaintiffs must first show that the actions complained of are attributable to the state. Second, the state actor must have acted so as to deprive the plaintiffs of their constitutional rights.

The constitutional requirement of "state action" for Fourteenth Amendment purposes and the requirement of 42 U.S. C. S1983 of action "under color of state law" are indistinguishable for purposes of this action. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982). When a private party acts together with a state official, the test of state action is whether "the conduct allegedly causing deprivation of a federal

right . . . [is] fairly attributable to the State." *Id.* at 937. The question of whether conduct is "fairly attributable to the State" is answered via a two-part test. The first inquiry is whether the deprivation was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.* The second inquiry is whether the party charged with the deprivation is "a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.*

In this case the essential inquiry is whether the state can be deemed responsible for the actions of O.H.S.A.A. in promulgating and enforcing Bylaw 4-6-10. The Court finds that O.H.S.A.A. is a "state actor" because the State of Ohio has implicitly delegated to it powers to manage, supervise, and guide all interscholastic activities within the state. Membership in the Association is available only to schools chartered by the Ohio Department of Education.

Where the actions of a voluntary association dealing with extracurricular activities are closely intertwined with the actions of the public school system in relation to those same activities, the action of the voluntary association if fairly attributable to the state. *U.S. ex rel. Missouri v. Missouri State High School Activities Ass'sn*, 682 F.2d 147 (8th Cir. 1982); *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968).

The first requirement of 42 U.S.C. §1983, that the defendants acted under color of state law, is met. The next inquiry is whether the defendants deprived the plaintiffs of any rights secured by the federal constitution.

The First Amendment, as set forth above, provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Bylaw 4-6-10 is neutral on its face; it applies to all students attending high schools affiliated with O.H.S.A.A. regardless of their religious preference. A statute neutral on its face may, in its application, violate the Free Exercise Clause if it unduly burdens the free exercise of religion. *Sherbert v. Verner*, 374 U.S.

398 (1968). Bylaw 4-6-10 does not deny the plaintiffs the right to actively practice the Catholic faith; nor does it interfere with the ability of high school students to obtain the religious education provided by a Catholic school. *See Valencia v. Blue Hen Conference,* 476 F. Supp. 809 (D.Del., 1979), *affirmed without opinion,* 615 F.2d 1355 (3rd Cir. 1980). The Court does not read the Free Exercise Clause so broadly as to include the freedom to engage in interscholastic athletics. Bylaw 4-6-10 does not deprive plaintiffs of First Amendments rights.

The right to participate in interscholastic athletics is outside the protection of the Due Process Clause of the Fourteenth Amendment. In a suit brought under 42 U.S.C. §1983, a high school athlete asserted that he was entitled to procedural due process regarding his athletic eligibility. The Sixth Circuit found that the Due Process Clause provided him no basis for relief. *Hamilton v. Tenn. Secondary School Athletic Ass'n,* 552 F.2d 681 (6th Cir. 1976). The *Hamilton* court quoted the following language from *Mitchell v. Louisiana High School Athletic Ass'n,* 430 F.2d, 1155, 1157-58 (5th Cir. 1970):

> For better or worse, the due process clause of the fourteenth amendment does not insulate a citizen from every injury at the hands of the state. "Only those rights, privileges and immunities that are secured by the Constitution of the United States or some Act of Congress are within the protection of the federal courts. Rights, privileges and immunities not derived from the federal Constitution or secured thereby are left exclusively to the protection of the states." . . . The privilege of participating in interscholastic athletics must be deemed to fall in the latter category and outside the protection of due process. (citations omitted).

In considering the O.H.S.A.A. rule which is the subject of this suit, an Ohio appeals court recently stated:

> Students have property and liberty interests in their education that are protected by the Fourteenth Amendment . . . But participation in athletic competitions, standing by itself as one stick in a bundle, does not rise to the level of a separate property or

> liberty interest to which a non-resident is entitled and of which he cannot be deprived without due process . . .

Menke v. Ohio High School Athletic Ass'n, 2 Ohio App. 3d 244, 245-46 (Ct. App. Hamilton Cty., 1981) (citations omitted).

In analyzing the nature of the state-created substantive property interest in education, one federal court has stated:

> the property interest in education created by the state is participation in the entire process. The myraid activities which combine to form that educational process cannot be dissected to create hundreds of separate property rights, each cognizable under the Constitution. Otherwise, removal from a particular class, dismissal from an athletic team, a club or any extra-curricular activity would each require ultimate satisfaction of procedural due process.

Dallam v. Cumberland Valley School District, 391 F. Supp. 358 (M.D. Pa. 1975). Enforcement of Rule 4-6-10 does not infringe on either the procedural or the substantive due process rights of the plaintiffs.

Bylaw 4-6-10 does not infringe on plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment. Courts must use the strict scrutiny standard of review in Equal Protection Clause analysis when the right claimed is "fundamental" or when the plaintiffs form a "suspect class." "Fundamental rights," as that term is defined for purposes of Equal Protection Clause analysis, include the right to freely practice one's religion. While the right to freely exercise a religious preference is accorded the strict scrutiny standard of judicial review, as noted above, Rule 4-6-10 does not impinge upon plaintiffs' First Amendment rights. Nor do nonresident high school athletes comprise a suspect class. *See Menke v. Ohio High School Athletic Ass'n. supra.*

To be constitutionally permissible the rule must be rationally related to a legitimate O.H.S.A.A. interest. Bylaw 4-6-10 bears a fair and substantial relation to the objects and purposes of O.H.S.A.A. It was passed in response to tensions which arose among member schools due to private schools' ability to recruit out of state athletes. It has operated to alleviate those prob-

lems. The rule does not offend the Equal Protection Clause.

Article IV, Section 2, Clause 1 of the United States Constitution provides: "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Courts and commentators have long agreed that the Clause provides some measure of federal protection for citizens who "venture beyond the borders of their own state." L. Tribe, American Constitutional Law, 405.

The Supreme Court has not yet made altogether clear the precise contours of the interests protected by the Clause. However, in *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978), the Court made the following statement concerning the scope of protection provided by the Clause to nonresidents of a state:

> When the Privileges and Immunities Clause has been applied to specific cases, it has been interpreted to prevent a State from imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State, . . . in the ownership and disposition of privately held property within the State, . . . and in access to the courts of the State, . . . It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons. Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State . . . No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State . . . Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do . . . Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those "privileges" and

> "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally. (Citations omitted.)

In finding that the statute in question did not violate the Clause, the Court stated:

> We do not decide the full range of activities that are sufficiently basic to the livelihood of the Nation that the States may not interfere with a nonresident's participation therein without similarly interfering with a resident's participation. Whatever rights or activities may be *"fundamental"* under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by non-residents in Montana is not one of them. (Emphasis added)

In dissent, Justice Brennan asserted that the "fundamental rights" inquiry was no longer a viable approach to Privilege and Immunities Clause questions. He proposed that a two part test be used in determining whether a state's discrimination against non-residents is permissible. This inquiry consists in determining, first, "whether the presence or activity of nonresidents is the source or cause of the problem or effect with which the State seeks to deal" and, second, whether "the discrimination practiced against nonresidents bears a substantial relation to the problem they present."

In *Hicklin v. Orbeck,* 437 U.S. 518 (1978) Justice Brennan, writing for a unanimous Court, found that the statute in question did not meet the two part test that he defined in *Baldwin* and thus violated the Privileges and Immunities Clause. He did not discuss whether a "fundamental right," as that term is defined for purposes of Privileges and Immunities Clause analysis, was involved. However, such a right clearly was involved in *Hicklin.* The statute, which required that certain employers hire Alaska residents in preference to nonresidents, clearly burdened non-residents in regard to their occupation or trade. The case does not stand for the proposition that the "fundamental rights" approach to Privileges and Immunities Clause analysis has been abandoned by the Court. *See* J. O'Connor's concurrence in *Zobel v. Williams,* 457 U.S. 55, 71 (1982), in which she acknowledged the continuing viability of the *Baldwin*

approach to Privileges and Immunities Clause analysis.

In *Hawaii Boating Association v. Water Transportation Facility*, 651 F.2d 661 (9th Cir. 1981), the court correctly analyzed the proper inquiry:

> The two cases [*Baldwin* and *Hicklin*] establish a two-step process. In order to come within the purview of the Privileges and Immunities Clause, the right involved must be "fundamental," as that term is described in *Baldwin*. If that step is met, the state must justify its discrimination be satisfying the requirements articulated in *Hicklin*. Reading *Baldwin* and *Hicklin* together, allows nonresidents protection against significant forms of discrimination, while recognizing that, in certain areas, a sovereign state may act in the interests of its own citizens. This view acknowledges that, although a collection of independent, sovereign states has been fused into one nation, these independent, sovereign states do retain a significant degree of autonomy.

The right to participate in interscholastic athletics is not a "fundamental right" as that term has been defined with regard to the Privileges and Immunities Clause. The analysis of Bylaw 4-6-10 therefore must end at the first step. The Clause does not afford plaintiffs protection against the imposition of a rule denying them the right to participate in Ohio athletic activities.

> Forty-two U.S.C. §1983
> Was not intended to be a vehicle for federal court correction of errors in the exercise of . . . discretion which does not rise to the level of violations of specific constitutional guarantees.

Wood v. Strickland, 420 U.S. 308, 326 (1975).

The Court concludes that the defendants did not violate any of the plaintiffs' constitutional rights, and accordingly, it is

ORDERED that the plaintiffs' request for injunctive relief be, and the same hereby is, DENIED; and it is

FURTHER ORDERED that the plaintiffs' request for declaratory relief be, and the same hereby is, DENIED.

John W. Potter
United States District Judge

Appendix B

No. 84-3 83

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN W. ZEILER, ET AL.,

Plaintiffs-Appelants,

v.

OHIO HIGH SCHOOL ATHLETIC ASSOCIATION;
RICHARD L. ARMSTRONG;
REV. MARTIN DONNELLY;
SISTER MARY CAROL GREGORY;
REV. RONALD OLSZWESKI;
REV. THOMAS McCLAIN; and
SISTER JEAN ZOELLER,

Defendents-Appellees

BEFORE: LIVELY, Chief Judge; ENGEL and MARTIN, Circuit Judges.

This cause having come on to be heard upon the record, the briefs and the oral arguement of the parties, and upon due consideration thereof,

IT IS ORDERED that the judgement of the District Court be, and it hereby is, affirmed upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

CERTIFICATION

I hereby certify that on this first day of April, 1985 three copies of the petition for Writ of Certiorari were mailed, postage pre-paid to Thomas Pletz, Attorney at Law, 1000 Jackson St., Toledo, OH 43624 and William Heichel, Attorney at Law, 804 Renkert Bldg., Canton, OH 44702, counsel for the respondents. I further certify that all parties required to be served have been served.

DAVID L. KOHLER
7928 Secor Road
Lambertville, MI 48144
Counsel for Petitioners